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5 **IN THE SUPERIOR COURT**

6 **STATE OF ARIZONA, COUNTY OF YAVAPAI**

7 STATE OF ARIZONA,

8 Plaintiff,

9 vs.

10 JAMES ARTHUR RAY,

11 Defendant.

V1300CR201080049

12 **STATE'S MOTION FOR**
13 **RECONSIDERATION RE: THE STRIKING**
14 **OF PROSPECTIVE JURORS**

15 **STATE'S REQUEST FOR COMPLIANCE**
16 **WITH THE MANDATES OF**
17 **RULE 18.5(d), ARIZ. R. CRIM. P.**

18 **(The Honorable Warren Darrow)**

19 The State of Arizona, through undersigned counsel, respectfully requests this Court to
20 reconsider the striking of jurors # 301589, 276890 and 293589. Additionally, the State requests
21 this Court to conduct appropriate rehabilitation of jurors as required by Rule 18.5(d), Arizona
22 Rules of Criminal Procedure. Reasons in support of the State's position are more fully set forth
23 in the following Memorandum of Points and Authorities.

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. Introduction**

26 On January 27, 2011, over the State's objection, the Court excused jurors ## 301589,
27 276890 and 293589. The State urged the Court to conduct oral voir dire, and to allow the State to
28 conduct oral voir dire, to attempt to rehabilitate these jurors. The Court did not grant the State's
29 request and struck the jurors. As explained below, Rule 18.5(d), Ariz. R. Crim. P., requires the
30 Court to conduct a thorough oral voir dire and to allow a party to attempt to rehabilitate a juror

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1 through oral questioning. Case law creates a presumption that rehabilitation would have been
2 possible when inadequate questioning makes it impossible for an appellate court to determine
3 whether the trial judge erred in removing the venire person for cause.

4 **II. Case law and Rule 18.5(d), Ariz. R. Crim. P., require the Court to allow a party an**
5 **opportunity to rehabilitate a juror.**

6 **A. The trial judge lacks the discretion to deny a party's request to conduct oral**
7 **examination of a prospective juror**

8 Rule 18.5 of the Arizona Rules of Criminal Procedure provides:

9 **d. Voir Dire Examination.** The court shall control the voir dire examination and
10 ***shall conduct a thorough oral examination of prospective jurors.*** In courts of
11 record, voir dire shall be conducted on the record. Upon the request of any party,
12 ***the court shall permit that party a reasonable time to conduct a further oral***
13 ***examination of the prospective jurors.*** The court may impose reasonable
14 limitations with respect to questions allowed during a party's examination of the
15 prospective jurors, giving due regard to the purpose of such examination. In
16 addition, the court may terminate or limit voir dire on grounds of abuse. Nothing
17 in this Rule shall preclude the use of written questionnaires to be completed by
18 the prospective jurors, ***in addition to oral examination.***

15 (emphasis added).

16 The clear language of this rule mandates that a trial court conduct oral voir dire of
17 prospective jurors. The clear language further mandates a trial court to permit either party to
18 conduct oral examination of prospective jurors. "The wording of the amended rule requiring a
19 reasonable examination on request of either party is not ambiguous. A reasonable amount of
20 time necessarily includes some amount of time to question on a key issue, subject, as the rule
21 says, to limit or termination to prevent abuse. The clear language and intent of the present rule is
22 that each party be given opportunity and reasonable time to question prospective jurors to
23 discover information relevant to challenges and to possibly rehabilitate them." State v.
24 Anderson, 197 Ariz. 314, 321, 4 P.3d 369, 376 (2000).
25
26

1 *State v. Anderson* was a death penalty case wherein the defendant was convicted of
2 armed robbery, conspiracy to commit murder, and three counts of first degree murder, and
3 sentenced to death. On appeal, the Arizona Supreme Court examined the trial court's removal of
4 three prospective jurors who indicated on a written questionnaire their moral opposition to the
5 death penalty, over defense counsel's objection and request for oral voir dire to attempt to
6 rehabilitate them. The Court held it was structural error to deny the party's request under Rule
7 18.5(d), Ariz. R. Crim. P., and reversed the conviction. The Court noted that not all violations of
8 Rule 18.5(d) are fundamental error, such as cases where the answers to the written questionnaire
9 reveal some disqualification not susceptible to rehabilitation, such as a relationship to the case or
10 party; where the denial of the right to question does not involve a significant issue; where the
11 judge conducts the appropriate questioning himself; or situations where the adverse party fails to
12 object, or when all parties consent to the exclusion. *Id.* at 324, 4 P.3d at 379.

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15 **B. The trial judge may not use written questionnaires to dispense with the thorough**
16 **oral voir dire required and allowed by the rule by both the court and counsel.**

17 In refusing to allow the State the opportunity to conduct oral voir dire in an attempt to
18 rehabilitate prospective jurors, this Court has acted contrary to the requirements of Rule 18.5(d),
19 Ariz. R. Crim. P. This rule provides for the use of written questionnaires to **supplement, not to**
20 **supplant, oral examination.** "Nothing in this Rule shall preclude the use of written
21 questionnaires to be completed by the prospective jurors, *in addition to oral examination.*" Ariz.
22 R. Crim. P. 18.5(d) (emphasis added).

23
24 As *Anderson* makes clear, Rule 18.5(d) is violated when the judge fails to comply with
25 the oral voir dire requirement. "Rule 18.5 cannot rationally be read to permit the trial judge to
26 use written questionnaires in order to dispense with the thorough oral voir dire the rule requires
the judge to make and to allow counsel. Such an interpretation would permit the judge to

1 completely abrogate oral voir dire examination, thus violating the text and intent of Rule 18.5.”

2 State v. Anderson, *supra*, 197 Ariz. 314, 321, 4 P.3d 369, 376.

3 **C. Appellate courts must assume rehabilitation would have been possible when**
4 **inadequate questioning in the voir dire makes it impossible for an appellate court to**
5 **determine whether the trial judge erred in removing the venire person for cause.**

6 “[W]e must assume rehabilitation on the *Witherspoon* question would have been possible
7 when ‘inadequate questioning’ in the voir dire procedure makes it impossible for an appellate
8 court to determine ‘whether the trial judge erred in removing [the venire persons] for cause.’
9 *Gray v. Mississippi*, 481 U.S. 648, 662-63, 107 S.Ct. 2045, 2053, 95 L.Ed.2d 622 (1987).” State
10 v. Anderson, *supra*, 197 Ariz. 314, 319, 4 P.3d 369, 374. In *Anderson*, the appellate court found
11 that because the trial judge had denied questioning beyond the prospective jurors’ written
12 answer, they were forced to determine from the written answers alone whether the stricken
13 jurors’ attitudes “were so entrenched as to disqualify them from service.” *Id.* at 319, 4 P.3d at
14 374. The Court noted the presumption that rehabilitation is possible, and reversed. “*Witherspoon*
15 does not allow the trial judge to dismiss prospective jurors for cause merely for expressing
16 objections, which may turn out to be equivocal, to the death penalty. To do so, without further
17 questioning for clarification, would violate the Sixth Amendment and due process if the jury
18 were responsible for sentencing. *See Witherspoon*, 391 U.S. at 521-23, 88 S.Ct. at 1776-77. We
19 have no way of knowing whether the prospective jurors’ objections here were general or fixed.”
20 State v. Anderson, *supra*, 197 Ariz. 314, 319, 4 P.3d 369, 374.

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23 **III. A violation of Rule 18.5(d) can constitute reversible error.**

24 Structural errors that affect the entire conduct of the trial, such as jury selection, are
25 reversible error.

26 Review of such errors is not like measuring the effect of erroneous evidentiary
rulings against the overall weight of properly admitted evidence. Errors involving

1 the composition of the court or jury affect the legitimacy of the entire proceeding,
2 leaving nothing to measure or weigh and requiring reversal. Chief Justice Rehnquist
3 put it another way in *Fulminante*: Errors that occur "during the presentation of the
4 case to the jury" are susceptible to a harmless error analysis because they may "be
5 quantitatively assessed in the context of [the] other evidence." *Id.* at 307-08, 111
6 S.Ct. at 1264. But errors that create "defects ... in the trial mechanism" itself affect
7 the "entire conduct of the trial from beginning to end," damage "the framework
8 within which the trial proceeds," and are therefore not subject to harmless error
9 analysis. *Id.* at 309-10, 111 S.Ct. at 1265.

10 State v. Anderson, *supra*, 197 Ariz. 314, 323-24, 4 P.3d 369, 378-79.

11 Although *Anderson* is a death penalty case, the mandates of Rule 18.5(d), Ariz. R. Crim.
12 P., apply to all cases. There are ample examples in case law illustrating that prospective jurors'
13 seemingly entrenched opinions, elicited through written questionnaires, can be rehabilitated
14 through oral voir dire. "A juror's preconceived notions or opinions about a case do not
15 necessarily render that juror incompetent to fairly and impartially sit in a case. *State v. Poland*,
16 144 Ariz. 388, 398, 698 P.2d 183, 193 (1985), *aff'd*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d
17 123 (1986). 'If a juror is willing to put aside his opinions and base his decision solely upon the
18 evidence, he may serve.' *Id.* The trial court can rehabilitate a challenged juror through follow-up
19 questions to assure the court that he can sit as a fair and impartial juror. *See, e.g., State v.*
20 *Walden*, 183 Ariz. 595, 609, 905 P.2d 974, 988 (1995); *State v. Chaney*, 141 Ariz. 295, 302-03,
21 686 P.2d 1265, 1272-73 (1984) (concluding that it was not abuse for the trial court to refuse to
22 excuse the challenged juror for cause because he assured the court that he could render an
23 impartial verdict)." State v. Martinez, 196 Ariz. 451, 459, 999 P.2d 795, 803 (2000).

24 CONCLUSION

25 The State respectfully requests this Court to reconsider its striking of jurors ## 301589,
26 276890 and 293589. Additionally, the State requests this Court to conduct appropriate
rehabilitation of prospective jurors, through oral questioning, before making a decision to strike

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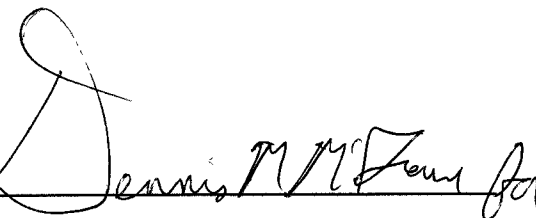
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1 them. The State further requests the Court allow the State the opportunity to conduct oral voir
2 dire of prospective jurors in an attempt to rehabilitate, as required by Rule 18.5(d), Arizona
3 Rules of Criminal Procedure, before any such jurors are stricken.

4 RESPECTFULLY submitted this 7th day of February, 2011.

6
7
8 By: 


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